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No. 92-1861

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN E. CURTIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, prohibits Congress from authorizing the Judge Advocate General to select commissioned officers in the military to serve as court-martial trial judges and judges of the courts of military review.

2. Whether due process requires that court-martial trial judges and judges of the courts of military review have fixed terms of office.

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OPINIONS BELOW

The opinions of the Court of Military Appeals, Pet. App. 88a, and the Navy-Marine Corps Court of Military Review, Pet. App. 89a-91a, in *United States* v. *Curtis* are unreported. The opinion of the Court of Military Appeals, Pet. App. 92a-105a, in *United States* v. *White* is reported at 36 M.J. 284; the opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 106a-114a, in that case is unreported. The opinions of the Court of Military Appeals in *United States* v. *Blake*, Pet. App. 116a, *United States* v. *Simpson*, Pet. App. 117a, *United States* v. *Nichols*, Pet. App. 118a, and *United States* v. *Graham*, Pet. App. 119a, are unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered in *United States* v. *Curtis* on April 8, 1993, in *United States* v. *White* on February 25, 1993, in *United States* v. *Blake* on April 14, 1993, and in *United States* v. *Simpson*, *United States* v. *Nichols*, and *United States* v. *Graham* on April 20, 1993. The petition for a writ of certiorari in these cases was filed on May 24, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. III 1991).

STATEMENT

Petitioner Curtis was convicted on one count of distribution of marijuana, one count of larceny, and nine counts of indecent acts, in violation of Articles 112a, 121, 125, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 912a, 921, 925, and 934. Petitioner was sentenced to confinement for seven years, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to the pay grade of E-1.

Petitioner White was convicted on one count of conspiracy and two counts of fraudulent enlistment, in violation of Articles 81 and 84 of the UCMJ, 10 U.S.C. 881 and 884. He was sentenced to a bad-conduct discharge.

Petitioner Blake was convicted on five counts of wrongfully making and uttering bad checks, in violation of Article 123a of the UCMJ, 10 U.S.C. 923a. He was sentenced to confinement for five months, a bad-conduct discharge, forfeiture of $500 pay per month for five months, and reduction to the pay grade of E-1.

Petitioner Simpson was convicted on one count of attempting to possess cocaine, one count of wrongfully possessing cocaine, and one count of wrongfully distributing cocaine, in violation of Articles 80 and

112a of the UCMJ, 10 U.S.C. 880 and 912a. He was sentenced to confinement for ten years, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to the pay grade of E-1.

Petitioner Nichols was convicted on one count of false swearing, in violation of Article 134 of the UCMJ, 10 U.S.C. 934. He was sentenced to confinement for two months, a bad-conduct discharge, and forfeiture of $500 pay per month for two months.

Petitioner Graham was convicted on one count of violating a lawful general regulation, one count of aggravated assault, and one count of simple assault, in violation of Articles 92 and 128 of the UCMJ, 10 U.S.C. 892 and 928. He was sentenced to confinement for 32 months, a bad-conduct discharge, forfeiture of all pay and allowances, and reduction to the pay grade of E-1.

In each case, the court of military review affirmed the findings and sentence, and the Court of Military Appeals affirmed the decision of the court of military review.

DISCUSSION

Petitioners present two claims. First, they argue that the military trial and appellate judges in their cases were not qualified to hold those positions because they were appointed to them by the Judge Advocate General of each respective service in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. Second, petitioners claim that their trials and their appeals to the courts of military review were fundamentally unfair because the military judges sitting on those courts do not enjoy a fixed term of office and can be reassigned to other

military duties by the Judge Advocate General based on his evaluation of their performance as judges.

The questions presented in this petition are not materially different from the questions presented in *Weiss* v. *United States*, cert. granted, No. 92-1482 (May 24, 1993), which the Court has already decided to review. Accordingly, we believe that this petition should be held until this Court has decided *Weiss* and should then be disposed of as appropriate in light of the Court's decision in that case.*

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* We note that petitioner White did not raise either claim at any stage of his case with regard to either the trial judge or the judges of the court of military review. See Pet. 3. What is more, no military court addressed those questions in his case. Accordingly, it is not clear that they are subject to review by certiorari in this Court. The statutes providing for certiorari review of the judgments of the Court of Military Appeals, 10 U.S.C. 867a(a) (Supp. IV 1992) and 28 U.S.C. 1259(3) (Supp. III 1991), restrict this Court's certiorari jurisdiction to "[d]ecisions" of the Court of Military Appeals. Article 67a(a) of the UCMJ, 10 U.S.C. 867a(a) (Supp. IV 1992), further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory authority to limit decisions in any case to less than all the issues urged by the accused. Art. 67(c), UCMJ, 10 U.S.C. 867(c) (Supp. IV 1992). Since petitioner White did not raise these issues for review by the Court of Military Appeals and since that court did not pass on these issues, there is a question whether that court rendered a "[d]ecision" on the issues that petitioner White presents in his petition.

It is unnecessary to answer that question in this case, however, because the Court of Military Appeals has indicated that it will accept out-of-time requests for relief from servicemembers if this Court grants relief to servicemembers in any of the other cases presently pending before the Court raising the same issues. *United States* v. *Rice*, 36 M.J. 264 (1993). Thus, if

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Weiss* v. *United States*, cert. granted, No. 92-1482 (May 24, 1993), and then should be disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted.

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this Court grants relief to the petitioners in *Weiss*, it may be appropriate to allow the Court of Military Appeals to decide whether to grant relief to parties such as petitioner White, since that course may render moot the question whether this Court can grant relief to such parties.